

## Promoting human rights through the EU external action: an empty “vessel” for sexual minorities?

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# ***Promoting Human Rights through the EU External Action: An Empty “Vessel” for Sexual Minorities?***

Carmelo Danisi<sup>1</sup>

## ***Abstract***

*Sexual minorities’ rights are increasingly included in the EU internal as well as external agenda. For example, while the Commission is called to monitor issues relating to sexual orientation and gender identity in accession countries, the EU Parliament has raised similar concerns in its dialogue with the African partners. Although this attempt is welcomed for stressing the need to protect a vulnerable group in countries where they have no guarantees, a “selective” non-discrimination approach seems to emerge in EU actions having an external dimension. This approach contradicts the EU normative framework and its internal developments dominated by the value of equality and may eventually be ineffective and counter-productive for targeted people. Considering the international trend in human rights law towards the recognition of the full spectrum of human rights irrespective of one’s sexual orientation or gender identity, this article posits the need for a significant change in the EU external approach in this field.*

## **1. Introduction**

After adopting long-term strategies in the field of Roma integration, discrimination on the basis of disability, and gender equality, the European Parliament (EP) has called for a *Road Map* against homophobia and discrimination on grounds of sexual orientation<sup>2</sup> and gender identity<sup>3</sup> (SOGI) in 2014.<sup>4</sup> It is aimed to mainstream the protection of the rights of LGBTI

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<sup>2</sup> “Sexual orientation” refers to “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”, as affirmed in the preamble of *The Yogyakarta Principles. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Yogyakarta, 2007, in [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

<sup>3</sup> “Gender identity” refers to “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other

(Lesbian, Gay, Bisexual, Transsexual and Intersex) persons in every field of action of the European Union (hereinafter EU). Among other things, the *Road Map* invites the Commission to continue “its current monitoring of issues relating to sexual orientation and gender identity in accession countries” and all relevant EU institutions to promote and protect “the enjoyment of *all* human rights by LGBTI persons and to maintain a unified position when responding to violations of these rights”.<sup>5</sup>

But what are the “issues” linked to these grounds of discrimination? It is true that, internally, the EU cannot take action in every aspect of life of LGBTI people. Consequently, accession countries are called to adopt only specific measures, while an even more restrictive attitude seems to emerge from the relations with other third countries. This approach seems in contrast with developments in its normative framework as well as in the case law of the Court of Justice of the European Union (hereinafter CJEU), which nowadays have allowed the Union to embrace a broader concept of human rights protection in relation to sexual minorities.<sup>6</sup> Considering that these developments put a greater emphasis on equality rather than non-discrimination,<sup>7</sup> is the EU ready to adopt a (more) substantive approach towards sexual minorities in the accession process? And what about its wider external action?

This exercise entails at least two questions: i) how fundamental are the rights of LGBTI people for the EU? ii) are accession or third countries willing to be involved in such a dialogue? In the following sections, I will address these questions considering, on the one hand, the international trend in human rights law towards the recognition of the full spectrum of human rights to people irrespective of their sexual orientation or gender identity (SOGI) and, on the other hand, the relationships between the EU and non-EU countries. In light of the post-Lisbon constitutional framework, which empowers and even obliges the EU to promote human rights actively in its wide external action (Article 3.5 of the Treaty on the European Union), I will verify: i) the dominant approach in the specific context of the accession process when LGBTI issues are addressed as goals to be achieved; ii) the role of SOGI with specific reference to African countries, where being homosexual or transgender is often still a crime. I will conclude by identifying the risks – if any – associated to a model that spreads the idea of tolerance rather than equality and questioning the need for a significant change first in the EU in order to be taken seriously in this field.

## **2. Defending the rights of sexual minorities within the European Union**

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*means) and other expressions of gender, including dress, speech and mannerisms”, as affirmed in the preamble of The Yogyakarta Principles, supra fn. 2.*

<sup>4</sup> European Parliament, 4 February 2014, doc. (2013/2183(INI)).

<sup>5</sup> *Ibid.*, point 4 L. In order to achieve these aims, the EP suggests using the Council’s Guidelines dedicated to LGBTI issues and external action, which is problematic in terms of content as explored below.

<sup>6</sup> In relation to the EU human rights regime and its more general developments, G. de Búrca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 2015, available at [www.eui.eu/Documents/MWP/ProgramActivities/MRW2014-2015/deburcaTheRoadnottaken.pdf](http://www.eui.eu/Documents/MWP/ProgramActivities/MRW2014-2015/deburcaTheRoadnottaken.pdf).

<sup>7</sup> For an analysis of the complexity of the concept of equality, S. Fredman, *Discrimination Law*, Oxford-New York, Oxford University Press, 2011, p. 4.

It may be said that, in the international context, the European Union has the leadership in the field of protection against discrimination on the grounds of sexual orientation and gender identity. Although it was not born with the aim of protecting the rights of the so-called vulnerable groups,<sup>8</sup> the first international binding instrument that takes into account sexual orientation discrimination was offered by the EU thanks to the 1997 Treaty of Amsterdam amending the Treaties establishing the European Communities.<sup>9</sup> The Treaty introduced a new Article 13 that enabled the Council to take appropriate action to combat discrimination based on various grounds, including sexual orientation.

In 2000, exercising this new power, the Council adopted Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.<sup>10</sup> This Directive provides for specific rules to ensure that nobody may be discriminated against in the field of employment and occupation because, amongst other grounds, of his/her sexual orientation. With this aim, it: i) defines the concept of discrimination, including direct and indirect, harassment and any instruction to discriminate, and ii) elaborates mechanisms to ensure effective remedies for the victims of such discrimination. It is clear that Directive 2000/78 applies only when all the conditions required by these definitions are satisfied.

Two specific aspects deserve to be addressed. First, the scope of applicability of the Directive is strictly limited to employment and occupation. Therefore, the prohibition of non-discrimination does not involve other fields falling within EU competence. In particular, the gap between the protection offered to sexual orientation (as well as to the other grounds covered by Directive 2000/78, i.e. disability, religion or belief, age) and the general framework provided for ethnic and racial discrimination has been denounced several times.<sup>11</sup> Although the latter covers, in addition to employment and occupation, also the fields of social protection, including social security and healthcare, education and access to and supply of goods and services which are available to the public, including housing, the call for an alignment aimed to fill the remaining gaps in protection remains unanswered. The proposal for a new Directive – advanced in 2008 – establishing a framework for a uniform minimum level of protection both in relation to all grounds and to several fields of competence of the EU has faced the opposition of EU member States and has not been

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<sup>8</sup> The focus on vulnerability is particularly evident in the works of the United Nations human rights mechanisms and in the case law of the European Court of Human Rights (hereinafter ECtHR). In relation to the former, see for example Human Rights Council, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, UN doc. A/HRC/19/41. As for the ECtHR, see in addition the case law mentioned here, L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, in *International Journal of Constitutional Law*, 2013, n. 4, p. 1056.

<sup>9</sup> *Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts*, signed on 2 October 1997 and entered into force on 1 May 1999.

<sup>10</sup> *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, OJ L 303, 2 December 2000.

<sup>11</sup> See, for example, the comments made by the Agency for Fundamental Rights of the European Union (FRA), *Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives*, no. 1/2013, available at: [http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf).

adopted yet.<sup>12</sup> Second, and perhaps more important, the Directive is inspired by a strict logic of non-discrimination, i.e. of treating likes alike, which leads to a reactive approach to discrimination and forgets to address equality in a substantive way. While the Directive does not call for the adoption of positive actions, it states that the principle of equal treatment “*shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds*”. This wording may give the impression that positive action constitutes an exemption from the principle of equality, rather than one of its expressions. As already stated elsewhere, this risks undermining legal clarity in the context of equality law and may hamper the adoption of a preventive approach to discrimination through genuinely positive actions.<sup>13</sup>

Coming to gender identity, this ground is not covered specifically by non-discrimination Directives. However, thanks to the interpretation given by the CJEU to the notion of sex, gender identity is covered *in part* by the protection offered by the Directives establishing frameworks against discrimination on the grounds of sex.<sup>14</sup> In particular, Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services apply to discrimination for reasons of the gender reassignment of a person. Thus, in relation to (a restrictive notion of) gender identity, the fields covered are employment and occupation, social security and access to goods and services. Yet, nothing can be asserted in relation to intersex persons, who are, at the moment, invisible for EU law. However, it is worth noting that, in the above mentioned *Road map*, the European Parliament called on the Commission to elaborate guidelines specifying that both transgender and intersex persons are covered under “sex”.<sup>15</sup>

Briefly, within the EU the current protection against discrimination varies by ground and by area and does not address substantive equality to any significant extent. However, two significant developments should be taken into account before looking at the way the EU promotes the rights of LGBTI people in accession processes and in external relationships. They may be very useful to overcome the pitfalls that may arise in this field of the EU action. The first is related to the entry into force of the Treaty of Lisbon and the influence of the system of the European Convention on Human Rights. The second is linked to the case law of the CJEU.

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<sup>12</sup> *Proposal for a directive of 2 July 2008 against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace*, COM/2008/0426 final.

<sup>13</sup> FRA’s Opinion, fn. 11, p. 5.

<sup>14</sup> The CJUE addressed this question in the case *P. v. S. and Cornwall County Council*, 30 April 1996, C-13/94. It is important to remember that this protection is partial, because the Court referred only to discrimination arising from the gender reassignment of a person and not to all manifestations of one’s gender identity.

<sup>15</sup> Point C (ii), *supra* fn. 4.

### 3. The Lisbon Treaty and the influence of the system of the European Convention on Human Rights

With the entering into force of the Treaty of Lisbon, it seems that the focus on equality as a value has been reinforced. First, Article 2 was introduced in the TEU, stating that the Union is founded on values of respect for *human dignity*, freedom, democracy, *equality*, the rule of law and *respect for human rights*, including the rights of persons belonging to minorities. In addition, according to Article 3 TEU, the EU shall combat social exclusion and discrimination as well as promote social justice. Article 21 of the same Treaty acquires a particular importance. It contains a general provision stating that the Union's action on the international scene should be guided by the principles that have inspired its own creation, development and enlargement, including the *universality and indivisibility* of human rights and fundamental freedoms, respect for *human dignity*, the principles of *equality* and solidarity.

Interpreted systematically, these Articles should provide a direction for every EU action, including external policies, especially when minorities are at stake. While it refers to the indivisibility of human rights, and not only to specific fields of protection, the idea of equality as human dignity invades the scene pointing out the need to respect and promote the rights of every person for his/her value as human being, irrespective of any personal characteristics. If we consider that the new Article 10 of the Treaty on the Functioning of the European Union (hereinafter TFEU) calls on the Union to combat discrimination based on sex and sexual orientation, among other grounds, in defining and implementing its policies and activities, the new path for equality should be taken seriously into account when EU policies and activities affect sexual minorities.

The Lisbon Treaty goes further still. It attributes to the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter') the same legal value as the Treaties. In relation to sexual minorities, the Charter is the first binding instrument to contain an explicit prohibition of discrimination on grounds of sexual orientation, in its Article 21. Moreover, the focus on equality and dignity is particularly strong if we consider that the Charter opens with a defence of human dignity that must be respected and protected (Article 1).<sup>16</sup> Taking into account the wording used to define some specific rights, we may definitely see how this idea of equality and dignity has been mainstreamed in the Charter. Therefore, when the authors of the Charter elaborated the right to marry avoiding the reference to the union of a man and a woman, they clearly had in mind a notion of marriage that is inclusive of sexual minorities, although it does not provide for an obligation on Member States to introduce same sex-marriage.

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<sup>16</sup> The *Explanations Relating to the Charter of Fundamental Rights*, 2007/C 303/02, do not provide for a definition of the concept of human dignity, but only state that it is the essence of the human rights protection. However, as far as sexual orientation and gender identity are concerned, it is worth noting that the Explanations affirm that "*none of the rights laid down in this Charter may be used to harm the dignity of another person*" and that it must "*be respected even where a right is restricted*". Following this line of reasoning, for example, the right to marry and to found a family may not be interpreted in a way that harms the dignity of LGBTI persons nor may it be restricted leading to the same outcome.

More importantly, the Charter should be read in light of the European Convention on Human Rights (ECHR), as interpreted by the ECtHR.<sup>17</sup> More generally, fundamental rights as guaranteed by the ECHR constitute general principles in EU law (Article 6 TEU). The engagement with the protection of the rights of LGBTI people should therefore take into account the developments occurred in the system set up within the Council of Europe. It is positive that the ECtHR has recognised in LGBT persons a group that has *special needs* requiring a proactive role by European States, both EU member States and candidate countries that are at the same time Members of the Council of Europe and bound by the ECHR. In particular, relying on the principle of non-discrimination as affirmed in Article 14 ECHR,<sup>18</sup> the ECtHR has the occasion to condemn discriminatory treatment against LGBT people in a series of fields such as: decriminalisation of homosexuality,<sup>19</sup> detention,<sup>20</sup> employment,<sup>21</sup> adoption,<sup>22</sup> parental authority.<sup>23</sup> But it has also addressed the questions around the affective dimension of one's sexual orientation or gender identity.<sup>24</sup> By stating that "*same-sex couples are just as capable as different-sex couples of entering into stable committed relationships*", the Court was able to apply the right to family life to committed same-sex couples<sup>25</sup> as well and, finally, to derive from it the obligation for States parties to set up an alternative way of legal recognition of their union in the absence of marriage equality.<sup>26</sup> This has led to a reinforced protection against discriminatory treatment on the grounds of a couple's sexual orientation in a range of contexts: the denial of social protection<sup>27</sup> and succession to a tenancy,<sup>28</sup> the refusal of step parent adoption,<sup>29</sup> the prohibition of being legally recognised through a civil union<sup>30</sup>.

If we consider that the ECtHR has also condemned restrictions on the freedoms of assembly and association<sup>31</sup> but upheld restrictions on the freedoms of expression and conscience<sup>32</sup> in order to defend the rights of LGBT people, we may conclude that the full spectrum of

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<sup>17</sup> Article 52 of the *Charter of Fundamental Rights of the European Union*, OJ C 326, 26 October 2012. See also the *Explanations Relating to the Charter of Fundamental Rights of the European Union*, *supra*, fn. 16.

<sup>18</sup> See, for more references, C. Danisi, *How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in its Non-discrimination Jurisprudence*, in *International Journal of Constitutional Law*, 2011, 793.

<sup>19</sup> ECtHR, 22 October 1981, *Dudgeon v. the United Kingdom*.

<sup>20</sup> ECtHR, 9 October 2012, *X v. Turkey*, and 20 October 2011, *Stasi v. France*.

<sup>21</sup> ECtHR, 27 September 1999, *Smith and Grady v. United Kingdom*.

<sup>22</sup> ECtHR, 22 January 2008, *E.B. v. France*.

<sup>23</sup> ECtHR, 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*.

<sup>24</sup> In relation to the need for legal recognition of a person's gender reassignment, see ECtHR, 11 July 2002, *Goodwin v. United Kingdom*; in relation to the refusal by the applicant's health insurers to pay the costs of her sex-change operation, see ECtHR, 8 January 2009, *Schlumpf v. Switzerland*.

<sup>25</sup> ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*. The Court went on affirming that "[C]onsequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship".

<sup>26</sup> ECtHR, 25 July 2015, *Oliari and Others v. Italy*.

<sup>27</sup> ECtHR, 22 July 2010, *P.B. and J.S. v. Austria*.

<sup>28</sup> ECtHR, 2 March 2010, *Kozak v. Poland*.

<sup>29</sup> ECtHR, 19 February 2012, *X and Others v. Austria*.

<sup>30</sup> When the law already provides for heterosexual couples, see ECtHR, 7 November 2013, *Vallianatos and Others v. Greece*.

<sup>31</sup> ECtHR, 3 May 2007, *Bączkowski and Others v. Poland*.

<sup>32</sup> ECtHR, 9 February 2012, *Vejdeland and Others v. Sweden*, and 15 January 2013, *Ladele and McFarlane v. the United Kingdom*.

human rights is applicable to LGBT(I) people<sup>33</sup> and should be enjoyed without any form of discrimination based on gender identity or sexual orientation. The *rationale* on which this case law is based is clear: a predisposed bias on the part of a heterosexual majority against a homosexual minority cannot in itself be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour may do. The focus on the discriminatory past suffered by the LGBT group and the need for a proactive role in terms of an anti-stereotyping approach by public authorities has gradually emerged and moved the scene from a strict non-discriminatory model to a substantive equality approach.

#### 4. Towards an equality approach within the European Union?

More recently, this move towards a less strict non-discriminatory approach seems to characterise also the CJEU in the field of non-discrimination on grounds of sexual orientation.<sup>34</sup> After having taken equality seriously when gender reassignment was at stake,<sup>35</sup> the Court has interpreted the anti-discrimination Directive 2000/78 as to include protection i) against obstacles in the access to employment for a homosexual person<sup>36</sup> and ii) of the right for a same-sex partner to receive the same treatment reserved to heterosexual partners/spouses in the field of application of the directive.<sup>37</sup>

In the first case, the Court had to address the issue submitted to national courts by a Romanian association against the national equality body related to the statements expressed against homosexual football players by the former owner of a football club which led the latter to not hire a supposedly homosexual player. Although there was not a clear victim of discrimination, the CJEU affirmed that a homophobic recruitment policy is prohibited by the Directive also *because of* the perception of such statements by the public or social groups concerned.<sup>38</sup> This conclusion comes even more unexpected if we consider that the author of the statement in question - “*there’s no room for gays in my family and [FC Steaua – the football club] is my family*” - was not formally in a position to decide who was to be hired in the team. In sum, it is evident that the Court adopted an anti-stereotyping approach that aims to combat social prejudices instead of the application of a “treating like alike” test,

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<sup>33</sup> Although an obligation cannot be derived at the moment from the ECHR, the same is also true as a matter of principle for the right to marry if we read Article 12 of the ECHR in light of Article 9 of the Charter of Fundamental Rights of the European Union, as the ECtHR did in the case *Schalk and Kopf*, *supra* fn. 19.

<sup>34</sup> It should be noticed that this approach is also visible in relation to other grounds such as disability, see CJEU, 11 April 2013, *HK Danmark*, C 335/11 and C 337/11, and 4 July 2013, *European Commission v. Italian Republic*, C 312/11.

<sup>35</sup> CJEU, 7 January 2004, *K.B.*, C-117/01, in particular para. 31.

<sup>36</sup> CJEU, 25 April 2013, *Asociația ACCEPT*, C-81/12.

<sup>37</sup> CJEU, 12 December 2013, *Hay*, C 267/12.

<sup>38</sup> At para. 51, *supra* fn. 32.



similarly to what it has already done for other grounds of discrimination such as ethnic origin<sup>39</sup>.

In the second case, the CJEU also seems to have looked at equality in relation to the treatment reserved to same sex couples in a Member State where such couples could not satisfy the requirements for accessing a social benefit due to their impossibility to marry. More specifically, Mr Hay accused his employer of discrimination because of the latter's refusal to award him days of special leave and a bonus following the entering into a civil solidarity pact (PACS) by Mr Hay. These benefits were granted only to employees who married and, being impossible for homosexual persons to get married, such advantages could be enjoyed only by heterosexual staff. The Court found that such treatment constituted a direct discrimination prohibited by Directive 2000/78 in light of the need to compare the situations lived by the applicant and his heterosexual colleagues in a specific and concrete manner relate to the benefit in question, and not in a global and abstract manner (spouse v. civil partner). In this assessment, it is relevant to take into account the purpose and the conditions for granting the benefit at issue: the leave and the bonus were given to staff when, in the context of the life together with their partner, they commit to providing material aid and assistance to each other. The same is true for homosexual couples who conclude a PACS in order to organise their life together such as heterosexual couples do with marriage. It is not significant that heterosexual couples entering into a PACS cannot benefit in the same way of such advantages, because they may choose to marry or not. This choice being impossible for LGB people at that moment in France, the denial of the same benefits reserved to different sex couples was certainly discriminatory on grounds of sexual orientation. Again, the Court focused the attention on the effects of the treatment and refused the application of a strict non-discriminatory approach, thus granting sexual minorities substantially the same protection heterosexuals have at domestic level.

Although the *rationale* underlying this case law is different from the one adopted by the ECtHR, we may find a European trend towards developing *inclusive* standards of protection for sexual minorities, also when same sex couples are at stake, in the light of their right to respect for family life.

## **5. Defending the rights of sexual minorities through the accession process**

Is this kind of approach based on equality reflected in the process that leads candidate countries to join the EU when the issue of sexual minorities is debated? Or does the EU limit its action to the traditional and strictly non-discriminatory model that emerges from EU secondary legislation?

It is well known that, according to the Copenhagen criteria,<sup>40</sup> countries wishing to join the EU need to have stable institutions guaranteeing respect for and protection of minorities

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<sup>39</sup> CJEU, 10 July 2008, *Feryn*, C-54/07.

while implementing human rights law. Significantly, in line with the international trend in human rights law, these criteria are applied as to include also the respect, the protection and the fulfillment of sexual minorities' rights. It is evident from the EU Commission's special attention to the situation of lesbian, gay, bisexual and transgender people in the accession countries' annual reports, within the fundamental rights section.

In general, the Commission has asked all the accession countries of the Western Balkans and Turkey for more robust measures to protect “*vulnerable groups from discrimination, in particular on the ground of sexual orientation*”.<sup>41</sup> Specifically, it has addressed the following issues: hate crimes and hate speech; training of law enforcement, ombudsman institutions, judges and media professionals; education; freedom of assembly and expression; and protection of human rights activists. More generally, the Commission has recommended those countries to take measures to “*counter stereotypes and misinformation*”, being aware that “*religious or cultural values cannot be invoked to justify any form of discrimination*” (emphasis added). Considering the declared continued commitment to the principle of “fundamentals first”, that calls on the Commission to continue to focus efforts on the rule of law and fundamental rights among others,<sup>42</sup> attention to discrimination based on SOGI remains a hot topic. Hence, although the Commission seems to refer *in abstracto* to every kind of discrimination, only serious breaches of human rights law are adequately monitored and, significantly, within them no room is left for those issues related to the enjoyment of the right to family life.

Having regard to the developments in Macedonia, Montenegro, Serbia, and Turkey, this limited approach emerges clearly from the last available progress reports.

For instance, in dealing with Macedonia, the Commission stressed on the level of intolerance towards LGBTI people, showed by the physical attacks occurred in the country and favoured by the persistence of homophobic media content. Not only the Commission asked for a full investigation in case of violence, but it called on public officials and media professionals to take greater responsibility in combating intolerance and ignorance, among others, through public condemnations. In dealing specifically with gender identity issues, it stressed that no proper gender reassignment treatment is still available.<sup>43</sup>

In Montenegro a positive development was reported in relation to the adoption of a strategy on LGBTI people, but violence during the Pride parade made it clear that a high level of homophobia persists.<sup>44</sup> It is worth noting that, among other aims, the strategy includes the introduction of an aggravating circumstance for criminal offences perpetrated in light of

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<sup>40</sup> See the Conclusions of the 1993 European Council in Copenhagen, available at [http://europa.eu/rapid/press-release\\_DOC-93-3\\_en.htm?locale=en](http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en). It is worth recalling that fundamental rights (in general terms) are one of the 35 policy fields of negotiation with candidate countries, on which the Commission reports specifically (see below in the text).

<sup>41</sup> European Commission, *Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2013-2014*, 16 October 2013, COM(2013) 700, at 2.

<sup>42</sup> European Commission, *Communication from the Commission to the European Parliament and the Council – 2016 Communication on EU Enlargement Policy*, 9 November 2016, COM(2016) 715 final, at. 2.

<sup>43</sup> European Commission, *The Former Yugoslav Republic of Macedonia 2016 Report*, 9 November 2016, SWD(2016) 362 final, at 60-61. See also previous reports.

<sup>44</sup> European Commission, *Montenegro 2016 Report*, 9 November 2016, SWD(2016) 360 final, at 65.

victims' sexual orientation or gender identity and the carrying out of a study on the model of partnerships adopted abroad to understand what kind of system is more suitable for Montenegro's society.<sup>45</sup>

In relation to Serbia, the Commission welcomed the first ruling on discrimination at work, but also denounced the lack of political support for LGBTI people, as demonstrated by the ban imposed on the Pride parade for security reasons, and the passive response of police to attacks against LGBTI people. Interestingly, the Commission referred also to the lack of procedures for legal gender recognition, even in cases of gender reassignment, and to discriminatory content in school textbooks, which "need" to be revised.<sup>46</sup>

Finally, as for Turkey, the Commission still requires substantial efforts to effectively protect this vulnerable group, considering that several murders are still motivated by the victims' sexual orientation and gender identity. While it is true that pride parades were allowed and the right to assembly was respected in some occasions, hate attacks and hate speech against homosexuals increased. Moreover, the Commission noticed no progress on a comprehensive anti-discrimination legislation and on hate crimes. Interestingly, the lack of positive developments in the Army, where homosexuality and trans-sexuality are still considered illnesses, was also raised.<sup>47</sup>

If we exclude the reference to Montenegro's attempt to discuss the introduction of a partnership for same-sex couples, the issue of family life is totally disregarded. If we add that, in the 2016's report, the Commission claimed that problems with enforcement remain also when legislation has been adopted in this limited sphere of rights, a number of doubts arise on the effectiveness of the accession process to realise its declared aims, at least in the sphere of human rights and SOGI. In sum, from this analysis it is clear that, apart from referring to Intersex people which are not considered at all within the current EU legislation, the Commission has pursued a limited scope when addressing the protection of minorities in the context of accession. The same seems true for the relations with third countries beyond the accession process.

## **6. Beyond accession: the Council's and EP's actions**

If taken as a whole, the EU approach in relation to SOGI issues may be investigated at least through the activity of the Council and the EP in the field of external relations. Significantly, from their intervention towards LGBTI minorities some peculiarities seem to emerge.

As for the Council, in its *Guidelines to promote and protect the enjoyment of all human rights by LGBTI persons* adopted during the Foreign Affairs meeting in June 2013 it focused only on very specific rights. Similarly to the above Commission's attitude, the Council included in the Guidelines a checklist on human rights standards related to

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<sup>45</sup> Respectively actions nos. 3, 27 and 8 of the *2013 - 2018 Strategy for Improving Quality of Life of LGBT Persons*, available at: [www.mmp.gov.me](http://www.mmp.gov.me).

<sup>46</sup> European Commission, *Serbia 2016 Report*, 9 November 2016, SWD(2016) 361 final, at 19, 62 and 63. See also previous reports.

<sup>47</sup> European Commission, *Turkey 2016 Report*, 9 November 2016, at 25, 73-76. See also previous reports.

criminalisation, homophobic and transphobic violence, human rights defenders and the promotion of the right to equality and non-discrimination, often recalled specifically in connection to the work place, the health sector and education.<sup>48</sup> Considering that the text is aimed at guiding officials of EU institutions and EU Member States in contact with third countries and with international and civil society organisations, and that the text's main tool of promotion is represented by political dialogue, only these specific issues need to be raised within EU institutions' and EU Member States' relevant activity. This 'limited' approach may seem surprising if compared with the declared reason for the Council's intervention in the field, i.e. the fact that LGBTI people have the same rights as all other individuals and "no new human rights are created for them".

Interestingly, the Council also expressed the need to strengthen the EU intervention in international forums in this field. This position was supported also by the EP that called for a stronger EU role at the United Nations for the promotion and the protection of LGBTI rights.<sup>49</sup> However, if we consider the content of the first UN Human Rights Council's resolution on non-discrimination based on SOGI supported by the EU,<sup>50</sup> again the rhetoric of protecting all human rights ends up corresponding to a limited catalogue of rights.

A similar approach dominated the dialogue with the African continent. The EU attempted to foster non-discrimination on SOGI in the enjoyment of economic, social and cultural rights and civil and political rights through the Joint Africa-Europe strategy during the fourth EU-Africa Summit.<sup>51</sup> However, they eventually agreed to avoid any references to SOGI minorities in the final *Roadmap 2014-2017*. Considering that the African Commission on Human and Peoples' Rights has now adopted its first resolution on the protection against violence and other human rights violations against persons on grounds of their real or imputed sexual orientation or gender identity,<sup>52</sup> a more active role by EU institutions within the Africa-EU Partnership might be more than welcomed to stress *inter alia* the need for its enforcement.

If the reason for this emerging European ambiguous approach seems also to depend on the counterparts' opposition to discuss openly SOGI issues, avoiding these topics or limiting their scope to please third actors may be counterproductive for LGBTI minorities themselves. Not only does this attitude appear in sharp contrast with the general equality *rationale* that should inform the obligation to consider SOGI in EU external action. It may also risk perpetrating stereotypes and subtle kinds of discrimination by indirectly

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<sup>48</sup> The idea of new rights is strongly supported by a specific group of States at the United Nations, see UN General Assembly, 21 December 2010, doc. A/65/L.53. The same group of State sought to block the HRC's Independent Expert on SOGI in 2016 (see below fn. 61).

<sup>49</sup> European Parliament, *Recommendation to the Council on the 69th session of the United Nations General Assembly*, 2 April 2014, doc. A7-0250/2014, see points 1 (j), 1 (m) and 1 (n).

<sup>50</sup> UN Human Rights Council, Resolution A/HRC/RES/17/19, 14 July 2011. On the role of the EU within the HRC, K.E. Smith, *The EU as a Diplomatic Actor in the Field of Human Rights*, in *The European Union as a Diplomatic Actor*, J. Koops and G. Macaj, 2015, 155-177. For an earlier analysis, K.E. Smith, *Speaking with One Voice? European Union Coordination on Human Rights Issues at the United Nations*, in *Journal of Common Market Studies*, 2006, 113.

<sup>51</sup> Fourth EU-Africa Summit, 2-3 April 2014, available at [www.africa-eu-partnership.org/sites/default/files/documents/2014\\_04\\_01\\_4th\\_eu-africa\\_summit\\_roadmap\\_en.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/2014_04_01_4th_eu-africa_summit_roadmap_en.pdf).

<sup>52</sup> African Commission on Human and Peoples' Rights, Resolution 275, 12 May 2014.

legitimizing the idea that SOGI issues are sensitive ‘domestic’ topics and/or that LGBTI people may be excluded from the enjoyment of some human rights. A clear example is the right to respect for family life, which is as fundamental as the prohibition of torture or freedoms of assembly and association already considered by EU institutions in their relations with third actors.

A more radical change seems to be promoted by the European Parliament in relation to the future agreement replacing the Cotonou Agreement.<sup>53</sup> According to the EP, not only should the revision process include an explicit mention of non-discrimination on grounds of sexual orientation or gender identity. In light of legislation criminalising homosexuality in some African, Caribbean and Pacific countries (ACP), the future Agreement should reinforce also the principle of non-negotiable human rights clauses as well as sanctions for failing to respect such clauses.<sup>54</sup>

This move might be fundamental for clarifying human rights issues at stake. In fact, while the ACP-EU Joint Parliamentary Assembly has increasingly reinforced its activity on the promotion of human rights within the joint dialogue on “political issues of mutual concern or of general significance”, the current reference to “discrimination of any kind” (Art. 8.4) as a common issue of concern is clearly interpreted by the two sides of the Agreement in different ways. The reaction to the EP’s attempts to condemn two ACP countries (Uganda and Nigeria) for adopting legislation further criminalising homosexuality is instructive. While for this EU institution it was a human rights issue, including in its discriminatory dimension, for the ACP countries it was only a question of morality to be ruled according to each country’s sovereignty. Not only did these countries recall their “people will and traditions” in line with their approach within the UN.<sup>55</sup> They have also called the EU to desist from linking sexual orientation and homosexuality to development aid and cooperation.<sup>56</sup>

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<sup>53</sup> See ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000 and revised in 2010 as the framework for EU’s relations with 79 countries from Africa, the Caribbean and the Pacific (ACP). It was concluded for a 20-year period from 2000 to 2020 and will be soon revised.

<sup>54</sup> European Parliament, *Resolution on the work of the ACP-EU Joint Parliamentary Assembly*, 11 February 2015, points 1, 14 and 15. It may be worth recalling that, since the early 1990s, the EU has ensured that trade and cooperation agreements include clauses aimed to: i) state that human rights, democratic principles and the rule of law are essential elements of the agreement; ii) ensure that a party may adopt appropriate measures, including the suspension of the agreement, in the event that the other party fails to comply with these essential elements of the agreement (i.e. the non-execution clause). See L. Bartels, *Human Rights Provisions in Economic Partnership Agreements in Light of the Expiry of the Cotonou Agreement in 2020*, Bruxelles, 2017.

<sup>55</sup> See P. Gerber, J. Gory, *The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?*, in *Human Rights Law Review*, 2014, at 1; I. Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN*, in *Health and Human Rights*, 2, 2004.

<sup>56</sup> ACP Parliamentary Assembly, *Declaration on Recent Proposals Adopted by the European Parliament with Regard to Uganda and Nigeria*, 19 March 2014. According to these countries, there is no international agreement on the definition of the concept of “sexual orientation and gender identity”, considering that they are not included in any universal international human rights treaty. Interestingly, the EU Charter of Fundamental Rights is the first international human rights agreement which includes an express reference to “sexual orientation”.

While this example also sheds light on the difficulty of promoting sexual minorities' protection through the European Parliament's own external diplomacy,<sup>57</sup> the EP's attempt to include expressly SOGI in the post 2020 Cotonou Agreement is aimed to set a "common ground of understanding" on how to apply the human rights clause when LGBT people are involved.<sup>58</sup> Having also regard to the need to respect the Charter's rights in external relations,<sup>59</sup> the European Parliament may set a positive precedent for all subsequent EU agreements.<sup>60</sup> Although the non-execution clause<sup>61</sup> would be probably limited to the most serious human rights violations against LGBT people and will be not related to the full spectrum of human rights, once adopted it will set the pace for future developments in the field. It also will support the EU efforts in political dialogue with third countries, as well as the EU position in the framework of formal and informal international human rights forums.<sup>62</sup>

## **7. An empty "vessel"? The risk of promoting a non-discriminatory model in the framework of the EU external action**

From our analysis, two different (even contradictory) trends may be identified. On one hand, the EU is increasingly willing to defend the rights of LGBTI group in the accession process and, more generally, within the framework of its external action. On the other hand, in opposition to other fields of human rights protection, the European institutions have to face increasing resistance by EU Member States in the adoption of new anti-discrimination Directives aimed to deepen the protection of any treatment based on SOGI within the EU itself.

The EP's 2014 proposal for a *Roadmap* calls for an alignment in protection across all grounds of discrimination. It further remembers that not only violence against LGBTI people needs to be addressed, but the full catalogue of human rights must be guaranteed.

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<sup>57</sup> It is no coincidence that a research into the activities of a few inter-parliamentary delegations (e.g. EuroLat, EuroNest, as well as the ACP-EU) does not show any express attempts to face the issue openly. This seems particularly true in the past: see, in light of its importance for sexual minorities, the ACP-EU Report on the freedom of association in ACP and EU countries, issued on 12 November 2007.

<sup>58</sup> See T. Tindemans, D. Brems, *Post Cotonou: Preliminary Positions of EU Member States*, ECDPM Briefing Note 87, February 2016, affirming that EU Member States are not willing to drop references to EU fundamental values including LGBT protection, at 6.

<sup>59</sup> For instance, CJEU, *Front Populaire pour la Libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario) v. Council of the European Union*, 10 December 2015, case T-512/12.

<sup>60</sup> On human rights clauses, F. Martines, *Human Rights Clauses in EU Agreements*, CLEER Papers, 4, 2016, 37. Previously, L. Bartels, *Human Rights Conditionality in the EU's External Agreements*, OUP, 2005; P. Leino, *European Universalism? The EU and Human Rights Conditionality*, in *Yearbook of European Law*, 2005, 329. More generally, U. Khaliq, *Ethical Dimensions of the Foreign Policy of the EU: A Legal Analysis*, 2009.

<sup>61</sup> See fn. 54.

<sup>62</sup> J. Bossuyt et al., *Political Dialogue on Human Rights under Article 8 of the Cotonou Agreement*, European Parliament's Development Cooperation Committee, June 2014. It is evident that the mere adoption of this new legal framework does not guarantee that the EU will enforce the human rights clause to protect sexual minorities. However, this aspect would be probably more related to the commitment of the EU as a global human rights actor rather than dependent on specific LGBTI issues.

This aspect seems to be neglected, perhaps purposefully, in the framework of external policy, probably in light of the lack of a consensus among the EU Member States in relation to certain rights involving same-sex couples and despite the role granted to the Union as an international independent actor from its Member States.

Indeed, when it comes to its external dimension, the EU action could be inspired by the “European” values and by the Charter’s content. While there have been developments in its system of protection, as explored in relation to the CJEU’s case-law, and those may be relevant as a starting point, political divisions between Member States in relation to minority rights prevent the emergence of a reasonable guidance. This calls into question EU’s “own” values, as expressed in Article 2 TEU, so this norm must be the permanent guide for EU’s external action. It is no coincidence that Article 49 TEU states that “*any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union*”. This is even more true in light of the difficulty faced by LGBTI people in having all the spectrum of human rights recognised worldwide.<sup>63</sup>

At the same time, a change within (some) EU Member States may facilitate the EU approach towards accession and third countries in the near future, including the necessity to add a reference to SOGI in EU agreements. This would reflect a consistent application of human rights clauses, and grant full credibility to the EU external action in this field. Most importantly, it may lead the EU to go beyond the mentioned limited approach to sexual minorities’ human rights, thus avoiding that its pressure on the protection of LGBTI people and the need for a proactive role by public authorities in third countries would be focused on few core rights rather than on the realisation of their full equality.

In fact, the current danger is that the EU may spread the idea that a kind of “half-protection” is legitimate, i.e. protection maybe offered against arbitrary violence, homophobic and transphobic speech, restrictions on freedoms of assembly and association, but there may be a lack of guarantees when the right to respect for family life is involved. This approach ignores LGBTI people’s needs and does not take into account the developments occurred with the entry into force of the Lisbon Treaty, including the value acquired by the Charter of Fundamental Rights, and the progress made by the case law of the CJEU and the ECtHR. To say it differently, the EU risks supporting the idea that SOGI are sensitive issues, which belong to the sphere of morality, cultural sensitiveness and traditions.

If we imagine the EU external action towards sexual minorities as a vessel, it needs to be filled not only with the *acquis communautaire* but also with the emerging equality model of protection. Together with a coherent internal policy, this approach appears to be the only

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<sup>63</sup> See the initiative, promoted by a group of African States, to block the mandate of the first Special Rapporteur on SOGI nominated by the UNHRC (Resolution 32/2, 2016). In the subsequent debate, the first of this kind in the whole history of UN special procedures, the EU seems to have played a significant diplomatic role in line with its strategy on paper. It contributed to stop the attempt to set a worrying precedent for the protection of LGBTI people as well as to prevent SOGI issues from being acknowledged and prioritized in the international agenda. See M. Ali et al., *What is the Future of the SOGI Mandate and What Does it Mean for the UN Human Rights Council?*, in *EJIL Talk!*, 15 November 2016, and the records of the 71<sup>st</sup> Session of the Third Committee of the UN General Assembly on 21 November 2016.

way for granting what the EU has put on paper, i.e., the need for effective protection of the people concerned worldwide, in line with a systematic interpretation of international and European human rights law. Opponents may assert that accession countries, as well as other third States, are not ready for such a change in sexual minorities issues. Maybe they are right.<sup>64</sup> Nevertheless, the risk of seeing the EU external action as an “empty vessel” or, in the best case, a “half-empty vessel” can seriously undermine the EU’s credibility and is hardly justified.

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<sup>64</sup> Nonetheless, developments in some accession countries show that a more radical and coherent action is possible, thanks also to a coordinated intervention with other international organisations such as the Council of Europe and OSCE. See the progress made by Montenegro, *supra* para. 5.